as rent but as temporary compensation, may it be conceded that the general principle does not apply.[12]

The right of election in the landlord prevents the rule from operating harshly. The situation is often described by the courts in terms of "waiver";[13] but "election" is a better term in that it emphasizes the landlord's right to choose between two courses of action.[14] If therefore by some statute he is deprived of his voluntary choice in the matter, and is compelled to receive rent after the cause for forfeiture, his right of action on that forfeiture should not be barred. So in the recent case of *Evans* v. *Enever*,[15] where a tenant was allowed by statute to stop a suit for possession for failure to pay rent by paying up back rent, it was held that the landlord in thus taking the rent would not be barred from suing on other prior breaches; and the American authority is in accord with this view.[16]

In neither case is the rule unfair to the landlord. Where he is free to elect, his acceptance is final: where he is compelled to accept, his rights are not barred.

CAN AN ADMISSION BY SILENCE WHILE UNDER ARREST BE USED AS SUPPORTING EVIDENCE? — It is well settled that if one fails to contradict a damaging statement made in his presence, under such circumstances that, hearing and understanding, he would naturally deny the statement if untrue, he is taken to adopt the statement as his own.[1] This is usually held to apply even if the statement is a charge of crime on suspicion of which the person is then under arrest;[2] and such adopted statements are admissible at the criminal trial as statements of the de-

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[12] Holman *v.* Knox, 25 Ont. L. Rep. 588 (1911).

[13] See Kenny *v.* Lun, *supra*, 256.

[14] See EWART, WAIVER DISTRIBUTED, 7, for an apt criticism of the loose use of "waiver."

[15] [1920] 2 K. B. 315. See RECENT CASES, p. 217, *infra*. See also Toleman *v.* Portbury, L. R. 6. Q. B. 245 (1871), L. R. 7 Q. B. 344 (1872), a case under the same statute as Evans *v.* Enever, *supra*, where on the landlord's refusal to receive the money at all it was paid into court.

[16] Palmer *v.* City Livery Co., 98 Wis. 33, 73 N. W. 559 (1897); Granite Bldg. Corp'n *v.* Greene, 25 R. I. 586, 57 Atl. 649 (1904). It is also possible to support these cases on the theory that a suit for possession is an election of such binding nature that acceptance of rent thereafter has no effect upon that election. Doe d. Cheny *v.* Batten, *supra*; Doe d. Morecraft *v.* Meux, 1 C. & P. 346 (1824); Doe d. Stedman *v.* McIntosh, *supra*; Importers Co. *v.* Christie, 5 Robt. (N. Y.) 169 (1867). See Cleve *v.* Mazzoni, 19 Ky. L. Rep. 2001, 2002, 45 S. W. 88, 89 (1898). *Contra*, Gomber *v.* Hackett, 6 Wis. 323 (1857); Guptill *v.* Macon Stone Co., 140 Ga. 696, 79 S. E. 854 (1913). See 1 TIFFANY, REAL PROPERTY, 2 ed., 302, 303. *Cf.* Barber *v.* Stone, 104 Mich. 90, 62 N. W. 139 (1895); Marshall *v.* Davis, 28 Ky. L. Rep. 1327, 91 S. W. 714 (1906).

[1] Rex *v.* Smithies, 5 C. & P. 332 (1832); Donnelly *v.* State, 26 N. J. L. 601 (1857). See 1 GREENLEAF, EVIDENCE, 16 ed., §§ 197–198.

[2] Kelley *v.* People, 55 N. Y. 565 (1874); State *v.* Sudduth, 74 S. C. 498, 54 S. E. 1013 (1906). *Contra*, State *v.* Diskin, 34 La. Ann. 919, 44 Am. Rep. 448 (1882); Commonwealth *v.* Kenney, 12 Metc. (Mass.) 235, 46 Am. Dec. 672 (1847); but see Commonwealth *v.* Spiropoulas, 208 Mass. 71, 94 N. E. 451 (1911), where "Me no talk. I want to see my lawyer," was held not silence nor denial and therefore an adoption of the statement.

fendant.[3] But it is seldom asked, because it is seldom necessary to decide, why the evidence is admitted and what effect it has.

This question was raised in the recent case of *People* v. *Cascia*,[4] where the defendant was convicted of robbery on evidence which, by statute, was not sufficient for conviction unless supported by other evidence. The only other evidence was an admission by silence of the defendant while under arrest. "Supporting evidence," as used in the statute, must be taken to mean positive evidence. Upon what ground could the defendant's adopted statement be used for the purposes of positive proof?

Such failure to deny is generally admitted under the name of an extrajudicial admission.[5] But an admission, properly so called, cannot be positive or supporting evidence. The reason for admitting extrajudicial admissions is precisely that for admitting prior contradictory statements of a witness, to attempt to impeach the present allegations of the admitter; [6] the effect of both is purely destructive.[7] Prior contradictory statements of a witness cannot be introduced for any other purpose than to destroy; [8] it necessarily follows that the same is true of admissions.[9] This is the only explanation of the rule that an admitter need have no personal knowledge of the facts he admits; [10] it is inconceivable that evidence with so little guarantee of trustworthiness should be used for purposes of positive proof. It is sometimes said that admissions are positive or corroborative evidence; [11] but the word "admissions" is there used, not in the proper sense of a verbal declaration, but as meaning conduct circumstantially evincing guilt.[12]

The second possibility is to consider the adopted statement, not as an admission, but as a confession. If it could be admitted on that ground a conviction could be secured; a confession is both supporting evidence [13] and itself generally held sufficient to convict when, as in the principal case, the *corpus delicti* has been independently proved.[14] But it is im-

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[3] But it must be strictly shown that the accused would naturally have denied the statements if they were untrue. People *v.* Page, 162 N. Y. 272, 56 N. E. 750 (1900); Geiger *v.* State, 70 Oh. St. 400, 71 N. E. 721 (1904).

"This evidence is admitted, not because somebody else made the statement, though in the hearing of the person to be charged, but because the latter has expressly or impliedly ratified and adopted it as his own statement." Merriweather *v.* Commonwealth, 118 Ky. 870, 875, 82 S. W. 592, 594 (1904).

[4] 181 N. Y. Supp. 855 (1920). See RECENT CASES, p. 210, *infra*.

[5] See Commonwealth *v.* Harvey, 67 Mass. 487, 488 (1854).

[6] The only qualification necessary to this analogy is that, while a witness offers nothing to impeach except his testimony, a party asserts the truth of all his pleading and evidence, so the admission can be used to attack any point in his case.

[7] See 2 WIGMORE, EVIDENCE, § 1048 (3).

[8] Robinson *v.* Duvall, 27 App. D. C. 535 (1906), aff'd 207 U. S. 583 (1907).

[9] State *v.* Willis, 71 Conn. 293, 41 Atl. 820 (1898).

[10] Reed *v.* McCord, 18 App. Div. (N. Y.) 381, 46 N. Y. Supp. 407 (1897).

[11] See State *v.* Jonas, 48 Wash. 133, 92 Pac. 899 (1907); State *v.* Workman, 66 Wash. 292, 119 Pac. 751 (1911).

[12] Admissions are sometimes said to be affirmative testimony as exceptions of declarations against interest to the Hearsay rule. See note 18, *infra*. But this cannot be the reason for admitting admissions *qua* admissions, for (1) declarations against penal interest are not within the exception; and (2) admissions are not excluded by the fact that the admitter is available.

[13] Schaefer *v.* State, 93 Ga. 177, 18 S. E. 552 (1893).

[14] Gilbert *v.* Commonwealth, 111 Ky. 793, 64 S. W. 846 (1901).

possible that the adopted statement could be here introduced as such. While it has been said that there can be a confession by silence,[15] no cases can be found to support the proposition. Probably the courts have considered a confession too serious a matter for the defendant to be deduced from mere silence; or perhaps they have felt that to consider a statement adopted by silence as a confession is a dangerous approach to a violation of the privilege against self-incrimination.[16]

The third possibility is to admit the adopted statement as positive evidence under the Hearsay exception of statements against interest. The requirement that the declarant be unavailable is satisfied by the fact that the defendant cannot be compelled to testify,[17] which is the situation in all criminal cases. And the statement is certainly against interest.[18] But the evidence cannot be received on that ground under the existing authorities; the exception is confined to statements against pecuniary and proprietary, and does not extend to penal, interest.[19]

One further possibility remains. The silence of the accused may be evidence, and positive evidence, not by way of assent to a third person's statement, but as conduct indicating a consciousness of guilt.[20] Such evidence is not obnoxious to the Hearsay rule because it is circumstantial and not testimonial. But because of the double inference necessary to make it incriminatory (from the indication to the consciousness and thence to guilt), it is of doubtful value before a jury; and the cautions with which it would have to be encompassed in order to eliminate all testimonial bearing would practically nullify its effect. Certainly the evidence in the principal case cannot be regarded as admitted from that standpoint as it was received without qualification.

In short, there seems to be no ground upon which the defendant's silence when accused could have been admitted for the purpose of positive proof, and hence no ground upon which the principal case can be supported. The court sustained the conviction merely by citing cases in which adopted statements had been received as admissions; but, as has been seen, such adopted statements, while properly admissible, are of no value where supporting evidence is required.

WHAT SATISFIES THE PUBLIC PURPOSE REQUIRED IN TAXATION. — The most recent illustration of the wide range of purposes that may be

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[15] See 1 GREENLEAF, EVIDENCE, 16 ed., § 215.

[16] See Bram *v.* United States, 168 U. S. 532 (1897).

[17] Harriman *v.* Brown, 8 Leigh (Va.), 697 (1837).

[18] It is this added evidential utility of admissions which explains the proposition, sometimes judicially sanctioned, that an admission is equivalent to affirmative testimony for the party offering it. "There is a wide difference between the declarations of an ordinary witness, a stranger to the suit, and the declarations of a party to the record. The former are admissible only for the purpose of impeaching or contradicting the witness, but the latter . . . may be offered to prove the truth of the matters thus admitted." Bartlett *v.* Wilbur, 53 Md. 485, 497 (1879). See also Hall *v.* Banning, 33 Cal. 522, 524 (1867).

[19] Donnelly *v.* United States, 228 U. S. 243 (1913); State *v.* West, 45 La. Ann. 928, 13 So. 173 (1893); Sussex Peerage Case, 11 Cl. & F. 85 (1844).

[20] Moore *v.* State, 1 War. (Ohio) 500 (1853); Holt *v.* State, 39 Tex. Cr. Rep. 282, 45 S. W. 1016 (1898).